

STATE OF MICHIGAN  
COURT OF APPEALS

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CAROLYN SCHARRET,

Plaintiff-Appellant,

and

JAMES SCHARRET,

Plaintiff,

v

CITY OF BERKLEY and DAN MURRAY,<sup>1</sup>

Defendants-Appellees.

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UNPUBLISHED

March 24, 2005

No. 246169

Oakland Circuit Court

LC No. 2001-035353-NZ

Before: Saad, P.J., and Sawyer and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendant Dan Murray. Based on our conclusion that defendant Murray did not owe plaintiff a duty, as a matter of law, we affirm the trial court's order granting summary disposition.<sup>2</sup>

Plaintiff, a homeowner in the city of Berkley, retained a plumbing service to perform repairs in the home in which her mother resided. Defendant Murray, in his capacity as plumbing inspector for the city, went to the home. Although the work was not officially completed during his final trip to the home, he indicated that the plumbing was in place and clamped. Consequently, Murray indicated that the work had been completed and approved.

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<sup>1</sup> Although both defendants are designated as appellees on appeal, the challenge in plaintiff's brief is limited to the dismissal of Dan Murray. Accordingly, we need not and do not address the propriety of summary disposition in favor of defendant city. See *Orion Twp v State Tax Comm*, 195 Mich App 13, 18; 489 NW2d 120 (1992).

<sup>2</sup> We will affirm the trial court where it reaches the correct result, albeit for the wrong reason. *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 150; 624 NW2d 197 (2000).

Approximately two days later, the plumber had to return to the home because of a problem. Ultimately, plaintiff had to retain another plumber to resolve continued plumbing issues involving the property.

Plaintiff filed this litigation against the city and individual inspector, defendant Murray. Based on the initial complaint, defendant Murray moved for summary disposition, alleging that he was entitled to governmental immunity. In response, plaintiff alleged that there was no allegation that defendant Murray was an “employee” of the city, and the complaint merely alleged that he was “employed by” the city. Plaintiff alleged that defendant Murray was not entitled to the protection of governmental immunity. The trial court denied the motion for summary disposition because of the uncertainty of defendant Murray’s employment status and ordered plaintiff to amend the complaint.

Defendant Murray filed a renewed motion for summary disposition. In discovery, it was learned that defendant performed inspections at the request of the city. Initially, he performed the inspections as an individual. He later formed a corporation, and the city issued checks for the inspections to the corporation. Although city officials did not deem defendant Murray to be an “employee,” he nonetheless was sent to homes in his capacity as plumbing inspector. Defendant alleged that he was an “agent” or extension of representatives of the city, and therefore, was entitled to governmental immunity. The trial court granted the motion for summary disposition, concluding that defendant Murray was a “member” for purposes of the governmental immunity statute.<sup>3</sup>

Review of the amended complaint revealed that plaintiff raised two causes of action against defendant Murray, negligence and gross negligence. However, plaintiff cannot sustain a negligence claim based on the inability to support the legal duty of such an action. To establish a prima facie case of negligence, the plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) causation, that include cause in fact and legal or proximate cause; and (4) damages. *Case v Consumers Power Co*, 463 Mich 1, 6 n 6; 615 NW2d 17 (2000). Duty is any obligation owed to the plaintiff to avoid negligent conduct, and whether a duty exists generally presents a question of law for the court. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). In determining whether a legal duty is imposed, this Court must evaluate factors such as the relationship of the parties, the foreseeability of the harm, the degree of certainty of injury, the closeness of connection between the conduct and the injury, the burden on the defendant, the moral blame attached to the conduct, the policy of preventing future harm, the burdens and consequences of imposing a duty and liability for breach, and the nature of the risk presented. *Valcaniant v Detroit Edison Co*, 470 Mich 82, 86; 679 NW2d 689 (2004); *Murdock v Higgins*, 454 Mich 46, 53; 559 NW2d 639 (1997).

Following review of the factors for imposing a duty, we conclude that defendant Murray owed no duty to plaintiff. In the present case, defendant Murray did not have any direct

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<sup>3</sup> Generally, an officer, employee, volunteer, or member is immune from tort liability for an injury to person or property while acting on behalf of the governmental agency. See MCL 691.1407(2)(a),(b).

relationship with plaintiff. Rather, defendant Murray was only on plaintiff's premises in his capacity as plumbing inspector for the city. Defendant Murray did not have any contractual relationship with plaintiff. Moreover, there is no indication, in light of this limited contact, that any permit approval resulted in assumption of liability by defendant Murray. Defendant Murray was allowed to enter plaintiff's premises for the limited purpose of ensuring that the work was performed in accordance with the city code. The quality of the workmanship remained an issue between plaintiff homeowner and the hired plumber. Rather, any breach of any duty involving the compliance with the city code was an issue between defendant Murray and the employing city.<sup>4</sup> Simply put, the factors present do not weigh in favor of imposing a duty where: the connection between defendant Murray's inspection and the injury is insignificant; the consequences of such a duty imposed on defendant Murray are burdensome; the degree of certainty of injury by the inspection is minimal; any foreseeability of harm arises from the performance of the work, not from the inspection; and the policy of preventing future harm is served when evaluated by the performance of the work, not the inspection. Plaintiff's appropriate recourse was to file suit against the plumbing service for breach of contract. Regardless of the characterization of defendant Murray's employment status with defendant city, his presence at plaintiff's property was at the direction of defendant for a limited role of ensuring that plaintiff's plumbing repair did not adversely impact the city's sewage system.<sup>5</sup> Thus, even if defendant Murray was not an employee of defendant city, summary disposition in his favor was proper.

Moreover, with regard to gross negligence, the second cause of action alleged, if we assume that defendant Murray was an employee of defendant city, the allegations against defendant Murray do not rise to the level of gross negligence, see *Maiden v Rozwood*, 461 Mich 109, 121-122; 597 NW2d 817 (1999), and plaintiff failed to establish that the acts of defendant Murray were the proximate cause of the injury. See *Robinson v Detroit*, 462 Mich 439, 445; 613 NW2d 307 (2000). Consequently, defendant Murray would be entitled to the protections of governmental immunity. See MCL 691.1407.<sup>6</sup>

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<sup>4</sup> Plaintiff did not pursue any claim based on a third party beneficiary theory, and plaintiff did not derive more than an incidental benefit from any relationship between defendants. See *Schmalfeldt v North Pointe Ins Co*, 252 Mich App 556, 562; 652 NW2d 683 (2002).

<sup>5</sup> On appeal, we note that the parties continue to dispute the employment status of defendant Murray, and plaintiff alleges that the corporate formation by defendant Murray precludes any entitlement to governmental immunity. Because of our conclusion that plaintiff failed to establish a duty owed by defendant Murray, we need not resolve the controversy regarding the parties' characterization of the employment status of defendant Murray.

<sup>6</sup> Based on our conclusion that summary disposition was proper, we need not address the propriety of the addition of plaintiff's husband as a plaintiff.

Affirmed.

/s/ Henry William Saad

/s/ David H. Sawyer

/s/ Karen M. Fort Hood